

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATIONS No 1904, 1905,  
2115 and 2116 of 1995

For Approval and Signature:

Hon'ble MR.JUSTICE N.N.MATHUR

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

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SHARDABEN HASMUKHLAL SHAH

Versus

VIKRAMKUMAR KANTILAL SHAH

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Appearance:

CRA 1904 & 1905/95

MR VC DESAI for Petitioners

Mr R N Shah for respondents

CRA 2115 & 2116/95

Mr R N Shah for petitioners

Mr V C Desai for respondent No.2

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CORAM : MR.JUSTICE N.N.MATHUR

Date of decision: 27/03/98

ORAL JUDGEMENT (Common)

Heard the learned Advocates for the parties. All

these Revision Applications filed against order dated 21.7.1995 passed by the Addl.Principal Judge, Court No.2, Ahmedabad, are disposed of by this common order.

2. Suit No.338/83 has been filed by the plaintiff petitioner for declaration that he continues to be a partner in the registered partnership firm - M/s. Navinchandra Popatlal's Company, defendant No.1 and for taking accounts from the defendants with regard to the said firm and to pass decree after taking the account with regard to the amount due for his share in the said partnership firm. Suit No.339/83 has been filed by the plaintiff petitioner for declaration that he continues to be a partner in the said registered partnership firm-M/s. Ramdas Dahyabhai's Company and for taking accounts from the defendants with regard to the said firm and to pass decree after taking the accounts with regard to the amount due for his share in the said partnership firm. During the pendency of the aforesaid suits, defendant No.2 in Civil Suit No.338/83 died on 12.3.1994. Information of his death was given by the learned Advocate for the defendant by pursis Exh.144 dated 13.6.1994. However, application for setting aside the abatement was filed on 14.3.1995. An application Exh.153 was filed for bringing legal representatives on record along with application Exh.151 for condonation of delay in Civil Suit No.339/83. Defendants No.3, 4 and 5 died on 12.3.1994, 27.3.1993 and on 31.6.1984 respectively. An information in that regard was given by the learned Advocate for the defendants by a pursis Exh.57 dated 30.6.1994. An application for bringing the legal representatives on record Exh.66 along with an application for condonation of delay Exh.64 was filed on 14.3.1995. Application Exh.62 was filed for setting aside the abatement. The learned trial Judge, by the impugned order, has granted application Exh.149 in Civil Suit No.338/83 by setting aside the abatement. Similarly, in Civil Suit No.339/83, the learned Judge granted Exh.62 setting aside the abatement. Hence the defendants have filed Revision Applications No.1904/95 and 1905/95 being aggrieved by the order of setting aside the abatement. The learned Judge rejected the application Exh.151 and 153 in Civil Suit No.338/83 rejecting the plaintiff's application for condonation of delay Exh.151 and application for bringing the legal representatives on record. Hence Revision Application 2115/95 has been filed by the plaintiff. Similarly, in Civil Suit No.339/83, application for condonation of delay Exh.64 and application for bringing the legal representatives on record Exh.66 has been rejected and hence being aggrieved of that order, Revision Application

No.2116/95 has been filed.

3. The learned Judge found that since the order of abatement was passed on 6.3.95 and the application for setting aside abatement has been tendered on 14.3.95, that was very much within the period of limitation and the question of delay does not arise. In view of this, the learned Judge set aside the abatement. However, considering the sufficient cause for condonation of delay in filing the application for bringing the legal representatives on record, the learned Judge found that the plaintiff was negligent, inasmuch as that even if information given by the defendant under the pursis Exhs. 83, 94 and 57 on 30.6.1994, the application was made as late as on 14.3.1995. The Court also did not find any justification for not filing application on the ground that the details with respect to the legal representatives were not available.

4. Order 22 CPC deals with death marriage and insolvency of parties. Rule 1 provides that death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives. Rule 9 provides the effect of abatement or dismissal. Sub-rule (2) of Rule 9 provides that the plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the assignee or the receiver in the case of an insolvent plaintiff may apply for an order to set aside the abatement or dismissal; and if it is proved that he was prevented by any sufficient cause from continuing the suit, the court shall set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit. Sub-clause (3) makes provisions of section 5 of the Indian Limitation Act, 1877 shall apply to applications under sub-rule (2). Section 10A casts the duty on the pleader to communicate to Court death of a party. It is settled position of law now that no formal order of abatement is necessary. The abatement is automatic and it becomes effective on expiry of 90 days prescribed for an application for substitution of legal representatives. Limitation is provided under Article 120 of the Limitation Act. Application for setting aside the abatement can be preferred within 60 days from the date of abatement as provided under Article 121 of the Limitation Act. There is no limitation provided for filing application under Section 5 of the Limitation Act for condonation of delay. Requirement is that there must be sufficient reason for condonation of delay. The Apex Court, in the case of STATE OF M.P. v. S S AKOLKAR, reported in AIR 1996 SC 1984 has held that consideration for condonation of delay in filing the application under

section 5 of the Limitation Act and consideration for setting aside the abatement, though required to be considered liberally, they are different. This Court in the case of MOHATTA BROS. v. CHATURBHIDAS CHIMANLAL & ORS., reported in 23 GLR 585 has held that the Court should not be highly technical so as to sacrifice cause of substantial justice in application for condonation of delay and if the delay has not caused prejudice to the opposite party, the Court should not refuse to condone the delay. The Court also took into consideration that there was no urgency as the suit was not likely to proceed. The Court also held that no specific prayer is necessary under Section 5 of the Limitation Act for setting aside the abatement. Taking up the Revision filed by the defendants for setting aside the abatement, I do not propose to disturb the order of setting aside the abatement, though for different reasons. The learned Judge was in error in setting aside the abatement for the reasons that the application for setting aside the abatement was filed within limitation computing from the date of the order of passing the order of abatement. It may be stated that on a pursis filed by the defendant, the order of abatement was passed on 6.3.1995. As I have already said, the order of abatement is automatic. There is no necessity of passing separate order of abatement of the suit. In any case, the limitation for setting aside the abatement has to be computed from the expiry of 90 days from the date of death.

5. Considering the reasons for the condonation of delay, in my view, the learned Judge was in error in not considering that there was sufficient reason for condoning the delay. Consistently this Court and the Apex Court have taken the view that the provisions should be construed liberally. Even if there is some negligence and it has not caused prejudice to other party, the delay can be condoned on payment of cost. On account of not filing application for setting aside the abatement and the application for bringing the legal representatives on record, no delay in disposal of the suit has caused. In view of this, the order refusing to condone the delay in filing application for setting aside the abatement deserves to be set aside.

6. In view of the aforesaid, this Revision Application No.2115/95 and 2116/95 are allowed. The order refusing to condone the delay below Exh.151 in Civil Suit No.338 and Exh.64 in Civil Suit No.339/883 are set aside. Revision Application No.1904/95 and 1905/95 granting application Exh.149 in Civil Suit No.338 and

Exh.62 in Civil Suit No.339/83 setting aside the abatement are rejected, though on a different ground. In view of this, the application for bringing the legal representatives on record in Exh.153 in Civil Suit No.338/83 and Exh. 66 in Civil Suit No.339/83 deserve to be granted. The plaintiff will pay the cost of each Revision Application to respondent which is assessed as Rs.500/- in each case.

Rule made absolute in CRA No.2115 and 2116/95. Rule in CRA No.1904/95 and 1905/95 discharged.

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msp.